

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

Appellant,

vs.

WILBERT LEE DAVIS,

Appellee.

No. 22,649 ✓

APPELLANT'S OPENING BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, former Warden and Louis S. Nelson, Warden of the California State Prison at San Quentin, California, respondent below and custodian of appellee, Wilbert Lee Davis, from an order of the United States District Court for the Central District of California.

A. Proceedings in the State Courts.

Appellee, Wilbert Lee Davis, was convicted of robbery after trial in the Superior Court of the State of California for the County of Riverside. On December 21, 1965, he was sentenced to the State prison for the term prescribed by law. No appeal from the judgment was taken.

Appellee subsequently filed an application with the California Court of Appeal for the Fourth Appellate District for leave to file late notice of appeal. This application was denied on August 31, 1966. S.B. Misc. No. 50-66.

Appellee's petition for a writ of habeas corpus in the Superior Court of the County of Marin was denied on January 4, 1967. His habeas application to the California Court of appeal was denied on February 24, 1967, and a similar petition to the California Supreme Court was denied on April 26, 1967. In all of these applications, appellee claimed that he had been deprived of his right to appeal from his judgment of conviction.

B. Proceedings in the Federal Courts.

On July 11, 1967, appellee filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. Case No. 47399 (CT 2-17). An order to show cause was issued by Judge Stanley A. Weigel on the same day (CT 18). Appellant, respondent below, filed a return to the order to show cause on July 17, 1967 (CT 19-27).

On July 21, 1967, Judge Weigel ordered the matter



transferred to the United States District Court for the Central District pursuant to the provisions of Title 28, United States Code section 2241(d) where it was renumbered 67-128-WPG (CT 28-30). On December 19, 1967, Judge William P. Gray of the Central District ordered the matter set for an evidentiary hearing and appointed counsel to represent appellee.

On January 15, 1968, a hearing was held in the United States District Court for the Central District of California and evidence and points and authorities offered on the issue of whether appellee had been wrongfully deprived of his right to appeal from his judgment of conviction in the state court. The court filed its memorandum of decision and order on January 31, 1968. The court found that the failure of trial counsel to file notice of appeal on appellee's behalf deprived him of equal protection of the law. The court ordered that, unless appellee be allowed to file a late notice of appeal and counsel be appointed to represent him on appeal, appellee should be discharged from custody on March 1, 1968 (CT 50-55).

Notice of appeal, application for certificate of probable cause and a motion for stay of execution of judgment pending appeal were filed by appellant on February 29, 1968 (CT 56-57). The court stayed the execution of judgment until March 5, 1968 (CT 58).

Appellant's notice of motion and motion for order of custody pending appeal were filed in this Court on March 5,

1968 (CT 61-62). The judgment of the District Court was ordered temporarily stayed to permit the orderly disposition of appellant's motion. Additional points and authorities in support of the motion were filed by appellant on March 8, 1968. Points and authorities in opposition to the motion were filed by appellee on March 21, 1968. Appellant's response to appellee's opposition to the motion was filed on April 12, 1968. On April 19, 1968, this Court ordered the order of the District Court stayed pending disposition of this appeal.

STATEMENT OF THE FACTS

In his petition filed with the United States District Court for the Northern District of California, petitioner alleged that, following his conviction, he intended to appeal. He alleged that he requested counsel to file notice of appeal and that counsel reviewed the record, determined that there was no error at trial, failed to file notice of appeal and failed to notify appellee of his decision. Appellee contends that he was thereby deprived of adequate representation by counsel and that this deprivation constituted a denial of equal protection of the law.

During the course of the evidentiary hearing held in the United States District Court for the Central District of California, appellee testified that after the jury returned its verdict of guilty, he asked the public defender who had represented him how to go about filing an appeal. Appellee related that the public defender told him that an appeal should

be filed after the conviction and that he would file it later. Appellee testified that this was the only conversation he ever had with the public defender concerning an appeal (RT 13).^{1/} He also testified that, long after the time for filing notice of appeal had elapsed, he corresponded with the California Court of Appeal for the Fourth Appellate District and the office of the County Clerk of Riverside County and learned that no notice of appeal had ever been filed (RT 14-22).

In response to questioning by the court, appellee testified that during all the time subsequent to his conviction and sentence, it had been his intention to appeal from the conviction (RT 22). Appellee also made reference to his correspondence with the Superior Courts of Riverside and Marin Counties, the California Court of Appeal for the Fourth Appellate District and the California Supreme Court in an effort to file a belated notice of appeal (RT 22-24). Finally, appellee testified that, as far as he had been concerned, the public defender had definitely promised to file notice of appeal on his behalf (RT 28).

In response to questions concerning the possible merits of an appeal, appellee testified that the testimony of prosecution witnesses was conflicting, that his identification as the robber by the victim of the robbery was

1. The reporter's transcript of the evidentiary hearing held on January 15, 1968 before the United States District Court for the Central District of California is hereinafter designated "RT."

inconclusive and that he objected to the manner in which the district attorney questioned witnesses for the prosecution (RT 32-34).

Mr. James Windham of the Office of the Public Defender of Riverside County testified that, following the verdict of guilty, appellee had asked him about taking an appeal. Windham advised appellee that the time for filing notice of appeal was within ten days after the imposition of sentence. Windham also told appellee that he would review the case and, if there was any possible basis for an appeal, he would file notice of appeal: otherwise, he would not (RT 37).

In discussing the factors upon which he based his opinion that an appeal was totally without merit, Windham testified that the case was basically factual in nature and that he felt there was no error in the course of the trial (RT 38). Windham testified that, following the verdict, appellee had simply asked him about the possibility of an appeal. Windham was under the impression that he had not been requested to file an appeal but that it had been left to him to determine whether there was error upon which an appeal might be based (RT 41-42). Windham did not notify appellee after reaching the decision not to file an appeal had been reached (RT 42).

Summarizing its view of the facts established by the evidence the district court noted that there was overwhelming proof that no appeal had been filed and that appellee

had not knowingly and intentionally waived his right to appeal. The court also noted that appellee may not have insisted to his attorney that he wanted an appeal filed and that the attorney felt that the matter was "pretty much in his hands." (RT 47). Finally, the court observed that with respect to any indication that the appeal was meritorious, there had been "a very limited showing" and that the court was in no position to adjudge the possible merits of the appeal (RT 48).

In its order filed January 31, 1968, the court found that promptly after the verdict was received, appellee expressed his desire to appeal to the public defender who responded that he would study the matter and would file an appeal if he could find any reasonable basis for doing so (Order, p. 1). The court also found that the public defender did give the matter consideration but concluded that an appeal was not warranted and did not file notice nor advise appellee of his decision (Opinion, p. 2). The court also noted that the public defender could not recall what issues might have been presented as possible errors on appeal but that appellee had recited several alleged conflicts in testimony and errors in the admission of evidence, the merits of which the court found impossible to evaluate (Opinion, p. 5).

The District Court found that, under California law, the initial appeal from a criminal conviction is granted as a matter of right and that, if appellee had been financially able to employ counsel, he would have had no trouble in having

notice of appeal filed and having been accorded a judicial determination of the merits of his appeal. The court concluded that the failure of the public defender to file notice of appeal deprived appellee of equal protection of law and ordered the issuance of the writ (Opinion, pp. 3, 5).

APPELLANT'S CONTENTIONS

1. The District Court erred in holding that the failure of appointed counsel to perfect appellee's right to appeal deprived him of a federally protected constitutional right.

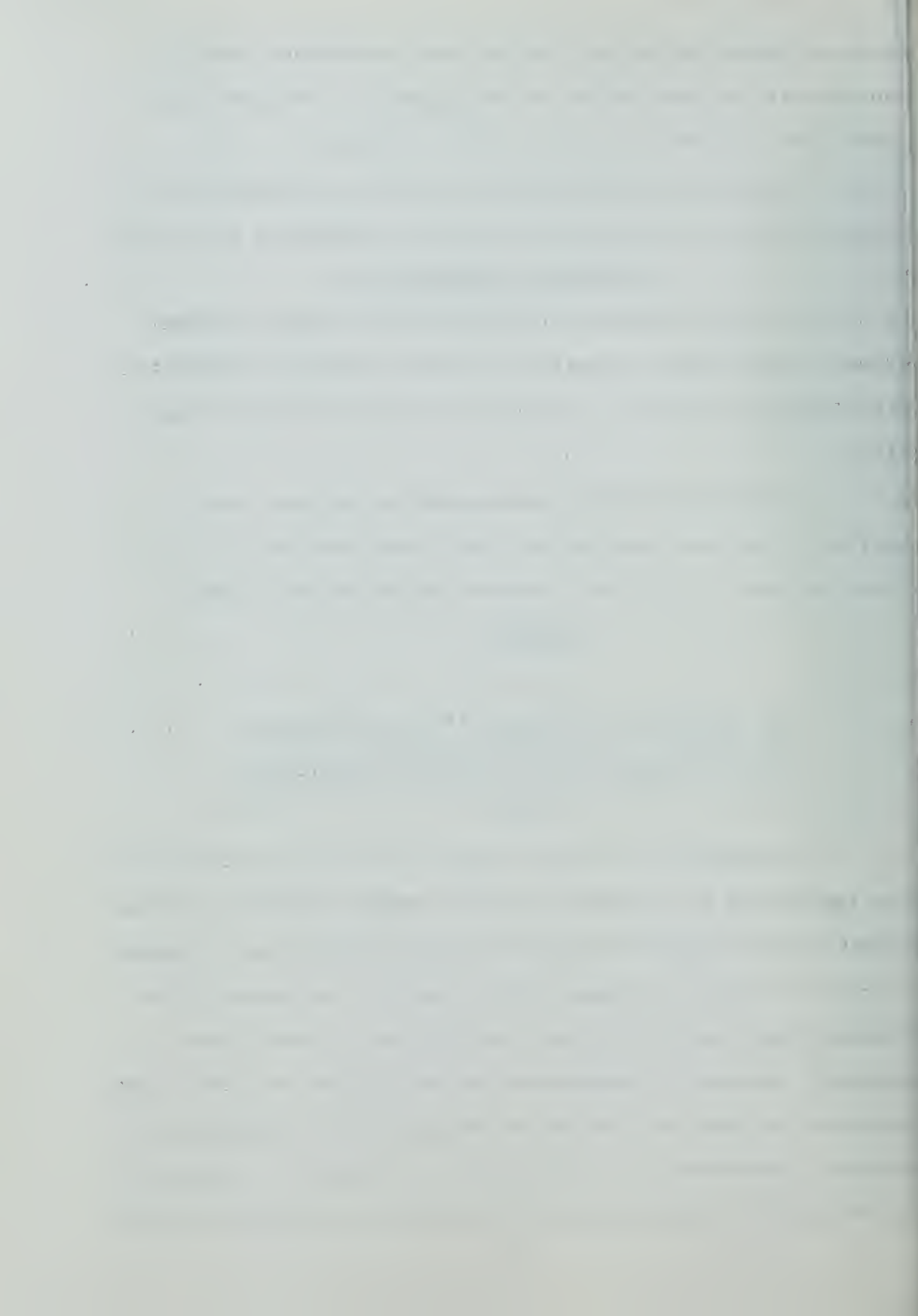
2. The district court erred in holding that appellee's failure to establish that there was merit to his appeal was not a bar to an order to reinstate the appeal.

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT
THE FAILURE OF APPOINTED COUNSEL TO PER-
FECT APPELLEE'S RIGHT TO APPEAL DEPRIVED
HIM OF A FEDERALLY PROTECTED CONSTITUTIONAL
RIGHT.

Noting that the first appeal from a criminal conviction is granted as a matter of right under California law and assuming that if appellee had been financially able to employ counsel, he would have been able to perfect his appeal, the District Court below held that the failure of appellee's appointed counsel to perfect his appeal denied appellee equal protection of the law. While an appeal from a criminal conviction in California is available as a matter of right upon the filing of a timely notice of appeal, the premise that the



result in this case would have been any different had counsel been retained instead of appointed is without support in the record.

In its order, the District Court noted that promptly after the verdict was received, appellee expressed a desire to appeal to the public defender who had represented him at trial. The public defender responded that he would study the matter and would institute an appeal if he could find any reasonable basis for doing so. The public defender did study the possibility of an appeal but concluded that an appeal was not warranted and neither filed notice of appeal nor advised appellee of his decision.

While it is not clear whether appellee ever definitely requested his counsel to file notice of appeal the comments of the District Court during the course of the hearing indicate that he did not (RT 47). Although appellee did testify that it was his impression that counsel had promised to file an appeal, the comments of the District Court judge during the course of the evidentiary hearing indicate that there was most likely a misunderstanding between counsel and appellee. It is apparent that appointed counsel was of the impression that the decision of whether to file an appeal had been left in his hands by his client, appellee. Appellant submits that the facts stated by the district court clearly indicate the court rejected any finding of a definite promise by counsel.

Assuming that appellee's counsel had been retained

rather than appointed, it is difficult to imagine how the actions of counsel would have been different as a result. Though indigent, appellee was afforded counsel who, following conviction, discussed the possibility of an appeal with his client and informed his client that, if there was any merit to his appeal, he would file notice of appeal. His client apparently acquiesced in this suggestion. Acting upon this apparent acquiescence, and in the absence of any indication to the contrary, counsel studied the record, made his decision and acted.

Appellant submits that there is no factual basis for concluding that retained counsel would have produced a different result. As observed by Judge Friendly in United States v. Follette, 358 F.2d 922 (2nd Cir. 1966), "Occasional shortcomings of counsel are a danger confronting all, . . . and those able to retain counsel may forfeit the right to appeal through such oversight or ineptitude as fully as those who are not. (Citations.)" Nor is there any evidence of action which may be attributed to the State to justify a determination that state action deprived appellee of the equal protection of the law.^{2/}

Nor was appellee denied adequate representation

2. LeMaster v. Beto, 387 F.2d 612 (5th Cir. 1967) and Collins v. Florida, 387 F.2d 636 (5th Cir. 1968) are distinguishable in that, in the instant case, there is no indication that counsel received a definite request to file notice of appeal and refused to do so or that appellee was unaware of his right to appeal and have counsel appointed to represent him on appeal.

and thereby deprived of due process of law. Rule 37(a)(2) of the Federal Rules of Criminal Procedure requires as does Rule 31(a) of the California Rules of Court that notice of appeal be filed within 10 days of the rendition of judgment in a criminal case. The federal courts have long held that this requirement is mandatory and jurisdictional and that time limitations for the filing of notice of appeal cannot be extended by the court even in instances of excusable neglect or misunderstanding between the defendant and counsel. United States v. Robinson, 361 U.S. 220 (1960); Berman v. United States, 378 U.S. 530 (1964). In the absence of deceit or fraud, the courts will not excuse a failure to file notice of appeal for the mere neglect of counsel. Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied, 382 U.S. 852 (1965).

In Fennell, during the course of trial, defendant had requested counsel to appeal. Despite the fact that the defendant had no intention of relinquishing his right to appeal, that right was lost by the inaction of his attorney. In Rodriguez v. United States, 387 F.2d 117 (9th Cir. 1967) this Court refused to allow a defendant in a federal prosecution to file late notice of appeal where oral notice of appeal had been given but counsel failed to file written notice within the time required by statute. The federal courts have applied a similar standard in cases resulting in the denial of a right to appeal arising in the state courts. In King v. Wainwright, 368 F.2d 57 (5th Cir. 1966), cert. denied, 389

U.S. 795 (1966) a state prisoner was deprived of his right of direct appeal due to a procedural error of his retained counsel. The court noted that the mistake of the applicant's counsel in failing to perfect the appeal did not constitute a denial of due process.

Citing Anders v. California, 386 U.S. 738 (1967) the District Court held that counsel was bound to proceed as an advocate in preserving the right of his client to appeal. The apparent impression of the District Court was that, in failing to file notice of appeal, counsel did not afford his client adequate representation. The federal cases heretofore cited indicate that the right of appeal is not absolute and that even neglect of counsel which results in the loss of the right to appeal will not compel the institution of a late appeal. Certainly a misunderstanding between counsel and his client which results in the loss of the right to appeal does not constitute a violation of due process. See Fennell v. United States, 339 F.2d 920 (10th Cir. 1965), cert. denied 382 U.S. 852 (1965) and King v. Wainwright, 368 F.2d 57 (5th Cir. 1966), cert. denied, 389 U.S. 795 (1966).

In Phelps v. United States, 373 F.2d 194 (10th Cir. 1967), cert. denied, 387 U.S. 913, trial counsel persuaded the defendant not to appeal from a federal conviction. When the District Court allowed the defendant to file a late appeal, the Court of Appeal reversed holding that there was no right to institute a late appeal where there was no indication that the advice of counsel in deterring defendant from filing notice

of appeal was not actuated by counsel's best judgment under the circumstances. Appellant notes that certiorari was denied in the Phelps case after the decision in Anders had been filed.

The record clearly indicates that appellee was aware of his right to appeal having been advised thereof by his appointed counsel. It is also clear that appointed counsel informed appellee that notice of appeal must be filed within 10 days after the imposition of sentence and that he would file notice of appeal if he were able to ascertain any meritorious basis for an appeal. Finally, though not discussed in the order of the District Court granting the petition, it is clear that appointed counsel believed appellee to have acquiesced in his offer to review the case with a view to the possibility of appeal and acted accordingly in reviewing the record, determining that an appeal was without merit and failing to file timely notice of appeal. For the reasons stated above, appellant submits that the evidence failed to establish that appellee has been denied either equal protection or due process of law.

II

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE'S FAILURE TO ESTABLISH THAT THERE WAS MERIT TO HIS APPEAL WAS NOT A BAR TO AN ORDER TO REINSTATE THE APPEAL.

During the course of the evidentiary hearing held before the United States District Court for the Central District of California, appellant submitted points and authorities indicating that relief from a failure to perfect

appeal will not be granted in the absence of some indication that the appeal has merit. Accordingly, the District Court elicited testimony from appellee concerning the points which he would raise if he were allowed to file a belated appeal. As previously noted, appellee's testimony indicated no more than his belief that there were conflicts in the testimony of the prosecution witnesses.

In the order granting the petition, the District Court judge noted that appellee recited several alleged conflicts in testimony and errors in the admission of evidence. Appellant respectfully submits that there is no indication from either the testimony of appellee or his counsel that there were any possible errors in the admission of evidence. Accordingly, appellee's proposed contentions on appeal are directed to nothing more than the sufficiency of the evidence. As a matter of state law, all such conflicts must be resolved in favor of such testimony as would support the findings of guilt by the trier of fact. People v. Daugherty, 40 Cal.2d 876 (1953), cert. denied, 346 U.S. 827 (1953); People v. Newland, 15 Cal.2d 678, 104 P.2d 778 (1940).

This Court has consistently held that relief from failure to perfect an appeal within the time designated by statute will not be granted in the absence of some indication that the appeal is meritorious. In Rodriguez v. United States, 387 F.2d 117 (9th Cir. 1967) this Court held that counsel's failure to file written notice of appeal within the statutory time limitation would not be excused and the appeal reinstated

in the absence of an assertion that the failure to appeal resulted in the loss of a basic right. The court noted that petitioner's allegations disclosed neither the nature of any error nor that prejudice had resulted. In McGarry v. Fogliani, 370 F.2d 42 (9th Cir. 1966) this Court declined to grant relief to a state prisoner who alleged that his retained counsel failed to perfect his appeal where the prisoner failed to show any prejudicial errors which would have called for a reversal.

In Doyle v. United States, 366 F.2d 394 (9th Cir. 1966), a motion to vacate judgment in a federal conviction, the record indicated that no appeal had been perfected on behalf of an indigent defendant who was unaware of his right to appeal and have counsel appointed. In remanding the case to the District Court, this Court noted that the instructions given at trial included one "so plainly erroneous and prejudicial that a court upon appeal would necessarily notice it as plain error" and held as a matter of law that there was "substantial and reversible error."

The case most often cited by this circuit and other circuits for the proposition that a belated appeal will not be allowed in the absence of "plain error" is Dodd v. United States, 321 F.2d 240 (9th Cir. 1963). In Dodd, appointed counsel of a federal prisoner failed to file notice of appeal although requested to do so. Noting that failure to appeal might not be excused by a mere showing of neglect of counsel, this Court required that "plain reversi-

ble error at the trial" be demonstrated in order to justify the granting of relief. The court remanded the case to the District Court for a hearing to determine if there was an intentional relinquishment of petitioner's known right to appeal and, if so, to determine if petitioner suffered any prejudice in not securing a review by direct appeal. See also Watkins v. United States, 356 F.2d 472 (9th Cir. 1966); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965); Miller v. United States, 339 F.2d 581 (9th Cir. 1965); Wilson v. United States, 338 F.2d 54 (9th Cir. 1964).

CONCLUSION

For all of the reasons stated above, appellant respectfully submits that the District Court erred in issuing the writ of habeas corpus and that the decision of the District Court should be reversed.

DATED: June 7, 1968

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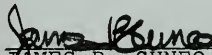
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: June 7, 1968



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Deputy Attorney General
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